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In The

Supreme Court of the United States

October Term, 1978

No. 78-820

REPUBLIC STEEL CORPORATION,
Petitioner,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Republic Steel Corporation ("Republic") petitions that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court below (*"Republic Steel II"*) (App. A, *infra*) is not yet reported. The court of appeals was sitting on remand under this Court's order directing it to reconsider its original opinion (*"Republic Steel I"*) in light of a subsequent statutory amendment. This Court's order is reported at 434 U.S. 1030 (App. C, *infra*). The opinion of the court of appeals in *Republic Steel I* (App. D, *infra*) is reported at 557 F.2d 91. The action of the

Environmental Protection Agency (App. F, *infra*) reviewed by the court of appeals below in *Republic Steel I and II* is not reported.

JURISDICTION

The judgment of the court below was entered on August 21, 1978 (App. B, *infra*). The jurisdiction of this Court is invoked pursuant to U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, as amended on December 27, 1977, establishes an unconditional, retroactively applicable July 1, 1977, deadline for achieving effluent limitations where those limitations were not administratively defined in time to permit achievement by such date.

2. Whether a person is entitled, as a matter of constitutional right and not merely administrative discretion, to the minimum time necessary to achieve a standard after that standard has been defined where failure to achieve such standard is punishable by substantial daily civil penalties and criminal penalties.

STATUTES INVOLVED

The constitutional and statutory provisions primarily involved are reproduced in Appendix G, *infra*.

STATEMENT

1. Administrative Proceedings In This Case

This case arises out of the action of the Administrator of the United States Environmental Protection Agency ("EPA") in disapproving a National Pollutant Discharge

Elimination System ("NPDES") permit proposed by the Ohio Environmental Protection Agency ("Ohio EPA") for issuance to Republic for its steel-making plant in Canton, Ohio. The Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 *et seq.* (the "Act"), requires that any person, like Republic, which discharges pollutants from a point source into the waters of the United States must possess an NPDES permit and must comply with the terms of that permit or be subject to substantial civil and criminal penalties. *See* Sections 301(a); 402(a),(b); 309(b)-(d); 505.[1] Ohio, like most states, has the responsibility for issuing NPDES permits to dischargers within its boundaries pursuant to a state program approved by EPA. Section 402(b); 39 *Federal Register* 26061 (July 16, 1974). Each NPDES permit issued by the Ohio EPA must comply with any applicable requirement of the Act, and the Ohio EPA must submit each proposed permit prior to issuance to EPA for review. Section 402(b),(d). EPA may disapprove and thereby prevent the issuance of any proposed permit which is "outside of the guidelines and requirements of [the] Act." Section 402(d)(2)(B).

On June 10, 1974, the Ohio EPA issued a draft NPDES permit for the Canton plant.[2] This draft permit established "final" effluent limitations that were to be achieved within 24 months and a schedule of compliance for designing, constructing, and placing into operation whatever treatment facilities were needed to achieve those final limitations (A. 1a-20a).[3] The draft permit did not

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1. Statutory citations are to sections of the Act. The Table of Statutes, *supra*, contains the parallel citations to the United States Code.

2. Republic had filed its application for this permit in 1972.

3. A copy of the appendix in the court below has been lodged with the Clerk of this Court. "A." designates references to that appendix.

specify what treatment facilities were to be installed by Republic. Republic had objections to several provisions in this draft permit and exercised its right under the Ohio NPDES permit program to file a request for an adjudication hearing before the Ohio EPA, and this draft permit never became effective. Ohio Revised Code Section 3745.07 (Page Supp. 1977); Ohio Administrative Code Section 3745-47-05.

Republic and the Ohio EPA then engaged in extensive negotiations which ultimately resolved all but one of Republic's objections. As a result of these negotiations, the final effluent limitations and other permit terms were substantially changed. Agreement on the final effluent limitations and all other terms, except the time for compliance with the final limitations, was reached on August 1, 1975. Despite the fact that a final permit could not then be issued, Republic agreed to proceed with the installation of the pollution-control facilities necessary to achieve the final limitations and agreed that August 1, 1975, would be the starting date for whatever schedule of compliance might ultimately be determined for achieving those limitations (A. 43a-44a).[4] Republic was unable to begin this work prior to August 1, 1975, because the detailed engineering of the facilities to be built could not commence until the final effluent limitations which those facilities had to achieve were determined (A. 51a, 83a-84a, 129a-130a).

An adjudication hearing was held on August 21 and 22 and September 2, 1975, to resolve this issue of the date for achieving the final effluent limitations. The evidence presented at the hearing clearly established that completion of treatment facilities would take 41 months (until January 1, 1979) for one outfall (A. 126a-127a) and

[4] The agreements reached between Republic and the Ohio EPA are contained in A. 21a-39a.

37 months (until September 1, 1978) for another outfall (A. 125a). The evidence also established that each treatment facility and its principal components had to be custom-designed and that detailed engineering could not commence until the final effluent limitations to be achieved were determined, which was not until August 1, 1975 (A. 51a, 83a-84a, 129a-130a).

After the hearing, the Ohio EPA on January 5, 1976, submitted to EPA Region V a proposed permit which required achievement of the agreed-upon final effluent limitations pursuant to the schedule of compliance supported by the hearing record (A. 137a-159a). The hearing record was also submitted to EPA Region V.

By letter of March 30, 1976, EPA Region V disapproved the issuance of the proposed permit (App. F, *infra*). Although EPA Region V did not question the reasonableness of the schedule of compliance, it determined that "the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit." App. 30a.

The provision of Section 301 upon which EPA's disapproval relies is Section 301(b)(1)(A)(i), which provides in pertinent part:

> . . . there shall be achieved –
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available *as defined by the Administrator pursuant to section 304(b) of this Act.* . . . (emphasis added)

EPA disapproved the proposed permit notwithstanding the fact that best practicable control technology currently available ("BPT") had not been defined by the Administrator as expressly required by Section 301. Section 304(b) provides that the Administrator is to define BPT by publishing "regulations, providing guidelines for effluent limitations." The Act requires the Administrator to promulgate these BPT guidelines by October 13, 1973, for 27 industrial categories, including iron and steel manufacturing. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 704 (CA DC 1974). The Act also provides for the implementation of the requirements of Section 301(b)(1)(A) through the issuance of NPDES permits to individual dischargers, but the Act requires that all dischargers are to be issued their initial NPDES permits no later than December 31, 1974. *Natural Resources Defense Council, Inc.* v. *Train*. 510 F.2d 692, 707 (CA DC 1974). For the Canton plant BPT effluent limitations were not defined by promulgation of guidelines by October 13, 1973, nor by the issuance of a final permit by December 31, 1974. The final effluent limitations for this plant were not determined until August 1, 1975, and it was not possible to build the treatment facilities needed to achieve those limitations by July 1, 1977.

2. Judicial Proceedings In This Case

Republic petitioned the United States Court of Appeals for the Sixth Circuit for review of EPA's disapproval which denied the issuance of the proposed permit to Republic. Section 509. The court of appeals held that Section 301(b)(1)(A) did not require achievement of the final effluent limitations in the proposed permit by July 1, 1977, and remanded the case to EPA. *Republic Steel Corporation* v. *Train*. 557 F.2d 91 (CA6 1977) ("*Republic Steel I*"). The court based its holding primarily

upon the express language of Section 301(b)(1)(A)(i), the statutory framework with its successive statutory deadlines for defining and achieving BPT effluent limitations, and the inequity of imposing unfair consequences on Republic for EPA's administrative shortcomings. App. 19a-20a, 25a. The court's decision in *Republic Steel I* not only rejected EPA's statutory interpretation but also expressed serious reservations as to the constitutional validity of such an interpretation. App. 24a n.17.

EPA petitioned this Court for a writ of certiorari to review *Republic Steel I*. While EPA's petition was pending, the Act was amended on December 27, 1977, by the enactment of Public Law 95-217, 91 Stat. 1566 ("1977 Amendments"). Shortly thereafter, this Court granted the petition and summarily vacated and remanded this case to the court of appeals "for further consideration in light of Public Law 95-217." App. 13a.

On remand, the court of appeals upheld EPA's disapproval of the permit and denied Republic's petition for review. *Republic Steel Corporation* v. *Costle*, No. 76-1557 (August 21, 1978) ("*Republic Steel II*"). The court did not reject the reasoning of *Republic Steel I* but rather concluded that this decision had been "effectively overruled" by the 1977 Amendments. App. 3a. Although the 1977 Amendments did not amend Section 301(b)(1)-(A)(i), the court held that Section 301(b)(1)(A)(i) established "a mandatory and unconditional July 1, 1977, deadline" for achieving PBT effluent limitations. App. 4a. This holding is based upon the addition by the 1977 Amendments of Section 309(a)(5)(B), which authorizes the discretionary issuance by EPA of extensions of the July 1, 1977, deadline. The court construed this new provision as the exclusive avenue of relief from this deadline. App. 4a. The court further held that this statutory change made by the 1977 Amendments with respect to the July 1,

1977, deadline could be retroactively applied to Republic's Canton plant. App. 8a-11a.

REASONS FOR GRANTING THE WRIT

The decision below involves important questions concerning the fundamental pollution control duties of industrial dischargers under the Act and the constitutional rights which protect dischargers against the denial of permits and the threat of sanctions for not achieving deadlines that cannot be achieved because pollution control standards were not established in time.

The holding of the court below that Section 301(b)(1)(A)(i) imposes an unconditional and mandatory July 1, 1977, deadline for dischargers to achieve BPT effluent limitations construes the Act in an unconscionable and unconstitutional manner. Administrative delays in implementing the Act have made it impossible for Republic to install water pollution control facilities by July 1, 1977. These administrative delays and their effect upon Republic are undisputed and are clearly documented in the record in this case; nonetheless, they are virtually ignored in *Republic Steel II*. EPA failed to fulfill its statutory duty to promulgate regulations defining BPT by October 13, 1973. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 704 (CA DC 1974).[5] Moreover, Republic

[5] There were no regulations applicable to the Canton plant until March 15, 1976, when EPA promulgated "interim final" BPT effluent guidelines limitations regulations for the alloy and stainless steel industry, and these regulations have been vacated and remanded. *American Iron & Steel Institute v. EPA*, 568 F.2d 284 (CA3 1977). These alloy and stainless steel regulations simultaneously established Section 304 guidelines and Section 301 effluent limitations. This simultaneous promulgation has been approved if "the purposes for issuing the guidelines were substantially achieved . . . and no prejudice has been shown." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 131-32 n.22 (1977).

was not issued a final, effective NPDES permit by December 31, 1974, as contemplated by the Act. These failures have deprived Republic of the necessary time for installing treatment facilities before July 1, 1977, since Republic could not commence the detailed engineering of its treatment facilities until the limitations to be achieved were determined. Consequently, Republic could not install these facilities by July 1, 1977, due to these administrative failures and through no fault of its own. These facts are undisputed, as demonstrated by the record in this case and the opinions below.

The holding of the court of appeals that a discharger's duty under Section 301(b)(1)(A)(i) to achieve BPT effluent limitations by July 1, 1977, exists unconditionally has widespread consequences.[6] Hundreds and perhaps thousands of dischargers have not been able to complete treatment facilities by July 1, 1977. EPA failed to meet the October 13, 1973, deadline for promulgating BPT regulations for all 27 industrial categories listed in the Act.[7]

[6] For example, at least three other cases pending in the Sixth Circuit alone raise the question of whether a July 1, 1977, attainment date exists under Section 301(b)(1)(A)(i) where compliance time has been reduced due to administrative inaction and delay. *Cleveland Electric Illuminating Co. v. EPA*, Nos. 77-3085, 77-3160; *Dayton Power & Light Co. v. EPA*, No. 77-3469; and *United States Steel Corp. v. Costle*, No. 76-2674. Decided cases involving a discharger's duty under this section are: *Washington v. EPA*, 573 F.2d 583 (CA9 1978); *United States Steel Corporation v. Train*, 556 F.2d 822 (CA7 1977); *Bethlehem Steel Corporation v. Train*, 544 F.2d 657 (CA3 1976), *certiorari denied sub. nom Bethlehem Steel Corporation v. Quarles*, 430 U.S. 975 (1977). *See also State Water Control Board v. Train*, 559 F.2d 921 (CA4 1977).

[7] Effective BPT regulations still do not exist for some of these industrial categories or segments thereof, including the alloy and stainless steel manufacturing regulations applicable to the Canton plant.

Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692 (CA DC 1975). As of September 30, 1976, approximately 12,000 dischargers had not been issued NPDES permits. *Eighth Annual Report of the Council on Environmental Quality* 35 (Dec. 1977).

The problem of lack of defined standards upon the ability to achieve water pollution control deadlines is not limited to the July 1, 1977, deadline. This problem is a continuing one, and it should be resolved now by this Court. The 1977 Amendments provide future deadlines for meeting additional levels of effluent reduction which must be defined by the same types of administrative actions that are involved here. See Section 301(b)(2)(C) (achievement of limitations based on "best available technology economically achieveable" by July 1, 1984, for specified toxic pollutants); Section 301(b)(2)(E) (achievement of limitations based upon "best conventional pollutant control technology" by July 1, 1984); Section 301(b)(2)(F) (achievement of limitations based on "best available technology economically achievable" for non-toxic, non-conventional pollutants within three years of establishment or by July 1, 1984, whichever is later, but not later than July 1, 1987).

The holding that Section 301(b)(1)(A)(i) establishes an unconditional duty to achieve BPT effluent limitations by July 1, 1977, is a clearly erroneous construction which ignores express statutory language. Surely, such a duty cannot exist for a discharger where no administrative action has been taken to define BPT. Since such implementing action is clearly necessary, it must be timely as well. Time is necessary to install wastewater treatment facilities, and it is absurd to fix a discharger's duty to install the best *practicable* control technology *currently available* without considering the time needed. Also, construing the July 1, 1977, BPT deadline to be unconditional renders meaningless the

statutory provisions requiring EPA to take certain actions by specified dates to define BPT as well as the statutory rights given to dischargers to participate in those administrative processes. *See* Section 101(e); *Washington* v. *EPA*, 573 F.2d 583, 590-91 (CA9 1978).

The court below erred in resting its statutory construction of Section 301(b)(1)(A)(i) upon the enactment of 309(a)(5)(B) as part of the 1977 Amendments. Section 309(a)(5)(B) does not alter the statutory scheme for defining BPT, nor does it provide a mechanism for defining BPT.[8] This section only authorizes EPA to grant "an extension of the date referred to in Section 301(b)(1)(A)" to any person in violation of or otherwise not in compliance with "the time requirements under this Act." It thus provides merely an administrative tool that can be used in an enforcement context to extend beyond July 1, 1977, an already established deadline that has been violated.

Section 309(a)(5)(B) is not an effective response to the unfair consequences that a discharger might suffer from EPA's failure to timely promulgate applicable BPT regulations. In reality, Section 309(a)(5)(B) is no relief at all. As the court of appeals notes, an issuance of an extension is discretionary with the Administrator.[9] The court also cites legislative history to the effect that a discharger which has been refused an extension has no right to a

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[8] The 1977 Amendments do not amend the language of any of the statutory provisions construed in *Republic Steel I*, including Section 301(b)(1)(A)(i). It should not be imputed that Congress amends express statutory provisions by such an indirect approach.

[9] "We do not mean to suggest that Republic may in any sense be *entitled* to an extension as a matter of law. The decision on whether or not to grant an extension is committed to the Administrator's discretion, based on his assessment of the factors listed in § 309(a)(5)(B)." App. 11a n.17 (citations omitted).

hearing or appeal.[10] Furthermore, a Section 309(a)(5)(B) extension is not available to any discharger which cannot complete treatment facilities by April 1, 1979. Moreover, EPA has taken the position that the issuance of an extension is not a defense to a suit brought by a citizen pursuant to Section 505 alleging violation of Section 301. 8 *BNA Environment Reporter* 1967, 1972 (April 14, 1978). Thus, even if a discharger were issued an extension, it still would run the risk of citizen suit enforcement actions seeking the imposition of daily civil penalties of $10,000 per day.[11]

The *Republic Steel II* decision overlooks the existence of unjust and unconstitutional consequences arising from the application of its construction of the 1977 Amendments to this case. Although the court of appeals recognized that under the principle of *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), the 1977 Amendments cannot be applied to this case if doing so would result in manifest injustice, the court applied this principle incorrectly by failing to perceive the adverse consequences for Republic. The court's application of the 1977 Amendments to Republic was in effect the imposition of a retroactive duty that had to be met by July 1, 1977; and the decision exposes Republic to the threat of enforcement action for noncompliance with its permit, notwithstanding the possibility of an extension under Section 309(a)(5)(B). It is manifestly unjust that Republic be placed in this position through no fault of its own and as a consequence of an administrative failure to timely define effluent limitations.

These same consequences also present constitutional difficulties which the Sixth Circuit did not address. Although the Sixth Circuit asserts that Republic could not claim that its noncompliance was induced by an administrative or judicial construction of the Act that the July 1, 1977, deadline was not applicable to its Canton plant, this assertion does not resolve the constitutional issues posed by the court's statutory interpretation. Republic's inability to achieve BPT effluent limitations by July 1, 1977, arises not from any mere inducement but rather from the lack of fair warning as to what effluent limitations it had to achieve. This constitutional right to fair warning exists as a matter of due process of law. *United States* v. *Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 673-74 (1973). As applied in this case, the Act also violates due process in that Republic is unreasonably being denied a permit for failure to do what is impossible due to circumstances beyond its control. *See Robinson* v. *California*, 370 U.S. 660 (1962); *Lambert* v. *California*, 355 U.S. 225 (1957).

Similarly, the 1977 Amendments cannot alter Republic's compliance status without violating the *ex post facto* clause which also guarantees a right to fair warning. *Beazell* v. *Ohio*, 269 U.S. 167, 169-70 (1925). The 1977 Amendments passed after July 1, 1977, cannot retroactively establish that date as an unconditional compliance deadline. The possibility of an extension under Section 309(a)(5)(B)

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[10] "Consequently, decisions by the Administrator pursuant to this new provision of law should not be the subject of administrative hearings and appeals but rather, if the Administrator feels he cannot determine that a source meets the requirements of section 309(a)(5)(B), that he will immediately proceed under any of the other enforcement options set out in section 309." App. 5a (citing Senate Report 95-370, 1977 U.S. Code Cong. and Admin. News 4387).

[11] Shortly after the *Republic Steel II* decision, EPA on its own initiative ordered Republic to supply certain information apparently directed toward determining whether the Canton plant is entitled to an extension. Republic supplied this information on October 10, 1978, but EPA has not yet taken any action. Even if EPA were to issue an extension, Republic would not be protected from citizen suits. Conversely, the permit denied Republic would provide such protection. Section 402(k).

does not save the court's construction of the 1977 Amendments, since the *ex post facto* clause looks to the punishment prescribed by the statute rather than to the punishment actually imposed. *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937). The court reasons that the 1977 Amendments in imposing a July 1, 1977, BPT compliance date is not an *ex post facto* law because such a deadline existed under EPA's interpretation of prior law and that this interpretation was an "operative fact" providing fair warning to Republic of the obligation that would be imposed in the future. This reasoning is an unprecedented and unwarranted extension of the operative fact doctrine announced in *Dobbert* v. *Florida*, 432 U.S. 282, 297-98 (1977).[12] The protection against *ex post facto* laws is substantially eroded if a person can be exposed to punishment for an act under a subsequently enacted statute merely because of an administrative agency's construction of a prior statute.

The decision of the Sixth Circuit has created a conflict among the circuits. *Washington* v. *EPA*, 573 F.2d 583, 591 (CA9 1978), holds that EPA has no authority to veto a state NPDES permit in the absence of previously promulgated, applicable BPT guidelines, since the existence of those guidelines "is an explicit precondition for the statutory *requirement* of § 301(b) that effluent reductions be achieved through the application of BPT." The Ninth Circuit construes Section 301(b)(1)(A) in the same

12. In *Dobbert* a death penalty statute in effect at the time a crime was committed but later invalidated as unconstitutional was deemed to be an operative fact as to the penalty for such crime so that the petitioner could be sentenced under an ameliorative, subsequently enacted death penalty statute. In contrast, the 1977 Amendments, as construed by the court of appeals, are not ameliorative; and an EPA statutory interpretation which had been judicially rejected cannot be deemed to be an operative fact as to what position Congress would take in the 1977 Amendments.

manner as the Sixth Circuit had done in *Republic Steel I* and for the same reasons (573 F.2d at 591-92):

> The express language of § 301(b) of the Act does not in terms require the reduction of effluents through the application of BPT no matter how expressed or determined. Rather, it calls for the achievement of "effluent limitations . . . which shall require the application of [BPT] *as defined by the Administrator pursuant to Section 304(b) of this Act.*"
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> * * * *
>
> We accordingly agree with the Court of Appeals for the Sixth Circuit that "[t]he presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events[.]" *Republic Steel Corp.* v. *Train*, 557 F.2d 91, (6th Cir. 1977). Although Congress intended that dischargers of pollutants be required to achieve effluent reductions applying the best practicable control technology currently available (as indicated by §301(b)(1)(A)), it elected to require that such a result be achieved through a complex administrative mechanism which contemplates the formulation by the Administrator of regulations developed under § 304(b)(1)(A) expressing such effluent limitations as general standards applicable to classes and categories of point sources prior to the transfer of the permitting authority to the states and thus necessarily prior to the Administrator's exercise of the veto power conferred by § 402(d).

The Sixth Circuit's attempts to distinguish the *Washington* case are untenable. Clearly the Ninth Circuit sees no distinction between the two cases, since it applies the reasoning of *Republic Steel I* to the disapproval of the effluent limitations in a permit in the absence of applicable BPT guidelines published by EPA. Furthermore, the Sixth Circuit's assertion that the Ninth Circuit's holding failed to consider the possible impact of the 1977 Amendments only serves to demonstrate another conflict. Although both

cases were decided after the enactment of the 1977 Amendments, the Sixth Circuit's decision views the 1977 Amendments as applicable and dispositive; whereas, the Ninth Circuit's decision does not apply them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 17, 1978

APPENDIX A

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

DOUGLAS M. COSTLE, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, *Respondents.*

ON REMAND from the Supreme Court of the United States.

Decided and Filed August 21, 1978.

Before: CELEBREZZE, LIVELY and KEITH, Circuit Judges.

CELEBREZZE, Circuit Judge. This case is before the Court on remand from the Supreme Court for further consideration in light of the Clean Water Act of 1977, P.L. 95-217. In our previous decision we held that the Administrator of the United States Environmental Protection Agency (EPA) had improperly vetoed issuance of a water pollution permit to petitioner Republic Steel Corporation (Republic) for its Canton, Ohio, mill. *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977) (hereinafter referred

to as *Republic Steel I*).[1] *Contra, United States Steel Corp.* v. *Train*, 556 F.2d 822, 854-55 (7th Cir. 1977).

The Administrator had objected to the permit, originally proposed by the Ohio Environmental Protection Agency (OEPA), on the ground that it improperly waived a July 1, 1977, statutory deadline for compliance with federal effluent standards. Under § 301(b)(1)(A)(i)[2] of the Federal Water Pollution Control Act as amended in 1972 (FWPCA) industrial dischargers were required to comply "not later than July 1, 1977" with "effluent limitations for point sources [requiring] the application of the best practicable control technology currently available, as defined by the Administrator pursuant to § 304(b)" of the Act. At the time of our previous decision EPA had not yet promulgated final regulations defining "best practicable technology currently available" (BPT) for categories of dischargers including iron and steel manufacturing, de-

[1] The case initially came before us on a petition for review of the Administrator's action, pursuant to § 509(b)(1)(F) of the Federal Water Pollution Act, 33 U.S.C. § 1369(b)(1)(F). The particular action submitted for review was a decision by the Administrator under § 402(d)(2)(B) of the Act to "object to," and thereby veto, issuance of a water pollution permit for the Canton mill as proposed by the Ohio Environmental Protection Agency. We note that the United States Court of Appeals for the Ninth Circuit has since ruled that § 509(b)(1)(F) does not convey jurisdiction on the courts of appeals to review permit vetoes by the Administrator under § 402(d)(2)(B). *Washington* v. *E.P.A.*, 573 F.2d 583, 586-87 (9th Cir. 1978). This Court has already ruled *contra*, however, *Ford Motor Co.* v. *E.P.A.*, 567 F.2d 661, 668 (6th Cir. 1977), and we adhere to our earlier view. *See also Mianus River Preservation Comm.* v. *Administrator, E.P.A.*, 541, F.2d 899, 909 (2d Cir. 1976).

[2] 33 U.S.C. § 1311(b)(1)(A)(i).

spite a requirement in § 304(b)(1)[3] of the Act that such regulations be published by October 18, 1973.[4]

We reluctantly concluded that EPA's failure to timely define BPT precluded the Administrator from imposing a July 1, 1977, compliance deadline, since Congress had apparently established promulgation of regulations under § 304(b) as a necessary precondition for imposition of the deadline in § 301(b)(1)(A)(i). Our decision was designed "to relieve the discharger of the unfair consequences" of being forced to comply with the deadline in the absence of applicable standards for guidance. 557 F.2d at 97.

This Court stayed its mandate in *Republic Steel I* pending the EPA's petition for a writ of certiorari from the Supreme Court. Shortly after EPA filed its petition for certiorari, Congress enacted the Clean Water Act of 1977, which substantially revised FWPCA. In the wake of that enactment, the Supreme Court granted EPA's petition, vacated our judgment in *Republic Steel I*, and remanded the case to this Court for further consideration in light of the new law, *Costle* v. *Republic Steel Corp.*, – U.S. –, 46 U.S.L.W. 3452 (1978).

We have reviewed the 1977 Act and conclude that its provisions have effectively overruled our previous decision. Although neither § 301(b)(1)(A)(i), requiring industrial dischargers to achieve BPT no later than July 1, 1977, nor § 304(b), requiring EPA to define BPT by October 18,

[3] 33 U.S.C. § 1314(b)(1).

[4] As of oral argument in this case (June 1978), EPA had still not promulgated final BPT guidelines for iron and steel manufacturing. In the absence of general standards, BPT has been determined on a case-by-case basis, either by the Administrator or by the responsible state agency. *See, e.g.*, OEPA regulation EP-31-04 (B)(1)(b) (1974).

1973, were amended by the 1977 Act, Congress did add a new § 309(a)(5)(B)[5] providing as follows:

> (B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

The legislative history of this provision makes it abundantly clear that Congress intended the procedure outlined therein to be the exclusive avenue of relief from the dictates of a mandatory and unconditional July 1, 1977, deadline. The Senate Report expressly rejected the rationale of *Republic Steel I*:[6]

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977. The Administrator can only issue an enforcement order requiring compliance within 30 days or initiate civil or criminal action. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in *Republic Steel Corporation* v. *Train* et al and Williams, – F.2d – ,(6th Cir. 1977) was an in-

[5] 33 U.S.C. § 1319(a)(5)(B).

[6] The Senate version of § 309(a)(5)(B) was adopted by the conference committee with only minor revision. H. R. Rep. No. 95-830, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4424, 4463.

> correct interpretation of existing law. This amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the 1977 requirements. To accommodate this objective, the committee amended section 309(a) of the Act to authorize the Administrator in his discretion to pursue one of two new options with regard to a discharger out of compliance.
>
> • • •
>
> The committee believes that a case has been made in our hearings on this bill that some relief from penalties must be granted for those sources which have made a good faith attempt to comply with the deadlines in the statute but for justifiable reasons have been unable to do so. The committee considered but rejected the alternative of providing a case-by-case extension of the deadline set out in the statute. That alternative was rejected because the committee felt that such a case-by-case extension would not only burden the administrative process but that it would provide further opportunity for delay for those sources which are otherwise unable to make a legitimate case for additional time. Consequently, decisions by the Administrator pursuant to this new provision of law should not be the subject of administrative hearings and appeals but rather, if the Administrator feels he cannot determine that a source meets the requirements of section 309(a)(5)(B) that he will immediately proceed under any of the other enforcement options set out in section 309. This authorization of limited flexibility granted to the Administrator will maintain the pressure for compliance while at the same time enabling the Administrator to use his discretion to grant any justifiable extension.
>
> Sen. Rep. 95-370, 95th Cong., 1st Sess. reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4385, 4387.

The import of the statute is now plain: the July 1, 1977, deadline cannot be waived by the courts. To the extent that noncompliance occurs despite good faith efforts as defined in § 309(a)(5)(B), relief is available only via

discretionary extension of the deadline by the Administrator.[7]

Republic urges that mere addition of a new remedial procedure does not change the operation of the rest of the Act as we construed it in *Republic Steel I*. We are bound, however, to read the amendment together with the original provisions of the Act "as parts of an integrated whole." *Markham* v. *Cabell*, 326 U.S. 404, 411 (1945). The unchanged sections and the amendment must generally be given "the most harmonious, comprehensive meaning possible" so that they do not conflict. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947). *See also* 1A Sutherland, Statutory Construction § 22.35 (1972). To insist on adherence to our earlier view would not only render § 309(a)(5)(B) largely meaningless, but also would defeat Congress' clearly expressed intent in enacting that section.

Moreover, the 1977 Act effectively responds to the concern we expressed in *Republic Steel I* that a discharger might suffer "unfair consequences" from EPA's failure to timely promulgate relevant BPT regulations. Under prior law, the Administrator had no clear statutory authority to extend the July 1, 1977, deadline and a discharger could be subjected to liability without any consideration for the reasons for his noncompliance.[8] The new § 309(a)-(5)(B) clearly permits the Administrator to extend the

[7] OEPA, which supported Republic's petition in *Republic Steel I*, now takes the position that the 1977 Act requires that we uphold EPA's position.

[8] Prior to the 1977 Act, EPA did provide relief from the 1977 deadline on an informal basis. Under the "Enforcement Compliance Schedule Letter" (ECSL) program, the Administrator would agree to refrain from enforcement of the statutory deadline against certain dischargers who made good faith attempts at compliance. *See Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657, 659-60 (3d Cir. 1976), *cert. den.*, 430 U.S. 975 (1977).

deadline where noncompliance was caused solely by the lack of BPT guidelines.[9]

We conclude, then, that the Administrator can properly object under § 402(d)(2)(B) of the Act to a proposed permit for a point source governed by § 301(b)-(1)(A)(i) if that permit does not require attainment of BPT by July 1, 1977, unless the Administrator has deter-

[9] The Senate Report indicates that § 309(a)(5)(B) was directed, in part, at dischargers whose noncompliance was caused by their inability to ascertain applicable standards, despite good faith attempts:

> The limited discretion granted to the Administrator by section 309(a)(5)(B) may only be exercised where the Administrator is able to determine that a discharger acted in good faith. The term "good faith" is generally understood to mean a reasonable attempt to comply with the mandates of law. *Did the discharger attempt to determine what the applicable requirements were?* When the required technology was generally known in the industry, but the discharger had some legitimate disagreements with the Agency on other points, did the discharger begin on an abatement program or conversely did the discharger delay the abatement program pending the outcome of lengthy administrative procedures? When the required technology was the subject of a legitimate dispute with the Agency, did the discharger take all other measures that it was capable f (such as segregating waste streams, necessary site preparation, and outfall construction) or did it delay these practices pending the outcome of lengthy administrative procedures?

S. Rep. 95-370, 95th Cong., 1st Session, 1977 U.S. Code Cong. & Admin. News 4326, 4386 (emphasis supplied).

The Ninth Circuit recently held that the Administrator could not veto a proposed permit for failure to require attainment of BPT by the discharger, where the Administrator had not yet promulgated applicable BPT guidelines. *Washington* v. *EPA*, 573 F.2d 583, 589-92 (9th Cir. 1978). The case is distinguishable in that here the Administrator did not object to the substantive effluent limitations in the proposed permit for the Canton mill – the objection related solely to the compliance schedule. In any event, the Ninth Circuit holding failed to consider the possible impact of the 1977 Act on the Administrator's veto power under § 402(d)(2)(B).

mined that a time extension is warranted pursuant to § 309(a)(5)(B).

This does not, however, end our inquiry. We must decide whether the 1977 Act may be applied in the context of this case, which was pending before the Supreme Court at the time the new law took effect.

The general rule is that "a court is to apply the law in effect at the time of its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). This principle applies with full force to an appellate court in reconsidering a decision that has been vacated and remanded by the Supreme Court in light of an intervening change in the law. *See Fruehauf Corp.* v. *Internal Revenue Service*, 566 F.2d 574, 577-79 (6th Cir. 1977).

The Clean Water Act of 1977 contains no "statutory direction or legislative history" militating against application of § 309(a)(5)(B) to pending cases.[10] To the contrary, the statute is applicable to "any person who *is* a violator of, or any person who *is* otherwise not in compliance with the time requirements" of the Act. § 309(a)-(5)(B) (emphasis supplied). Moreover, the Senate Report indicates that the § 309 procedure was intended to

[10] The conference report contains language regarding "existing administrative and court orders":

> It is the intent of the conferees that under the provision which allows the Administrator to establish a reasonable time in which to comply with an enforcement order, existing administrative and court orders which provide for attainment dates beyond April 1, 1979, continue in effect unless modified under these amendments. Therefore, the existing enforcement policy of the EPA is continued.

H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

This language has no application to the instant case, since there are no "existing" administrative or court orders providing for attainment dates beyond April 1, 1979, for the Canton mill.

"codify" the informal EPA practice already in existence, under which the Administrator stood firm behind the 1977 deadline, but delayed enforcement where the discharger showed the requisite good faith efforts at compliance.[11] *See* Sen. Rep. No. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4386. The Conference Report likewise indicates that under the 1977 Act "the existing enforcement policy of the EPA is continued." H. R. Rep. No. 95-830, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4424, 4464.

Nor do we think that application of current law would result in manifest injustice. If Republic has made good faith efforts at compliance with the law that have been delayed only by EPA's failure to timely promulgate BPT standards, then the company will be eligible for an extension under § 309(a)(5)(B).[12] There is nothing fundamentally unfair in predicating relief from the deadline on a showing to the responsible agency that the polluter has made a "reasonable attempt to comply with the mandates of the law." Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386. Indeed, to require anything less would work an injustice on the overwhelming majority of the nation's major industrial dischargers who followed the law as best they could and met the statutory timetable.[13] It would

[11] *See* note 8, *supra*.

[12] We assume, as we must, that the Administrator will make the necessary determination with regularity and fairness. *See United States* v. *Morgan*, 313 U.S. 409, 421 (1941); *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); K. C. Davis, Administrative Law Treatise § 11.06. *Cf. Withrow* v. *Larkin*, 421 U.S. 35, 47, 55 (1975).

[13] According to the Senate Report, ninety percent of the nation's major industrial dischargers were expected to meet the 1977 deadline. Sen. Rep. No. 95-370, 95th Cong. 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4333.

also flaunt the national commitment to attainment of water quality capable of supporting fish, wildlife and recreation by 1983, and the total elimination of pollutant discharges by 1985. 33 U.S.C. § 1251(a)(1) & (2). Application of current law is particularly favored where such matters of great national concern are at stake. *Bradley, supra,* 416 U.S. at 719-20.

The situation might be different if Republic could claim that its noncompliance was induced by administrative or judicial construction of § 301(b)(1)(A)(i) to the effect that the July 1, 1977, deadline was waived by EPA's failure to promulgate BPT guidelines. *See generally United States* v. *Pennsylvania Ind. Chem. Corp.*, 411 U.S. 655, 670-75 (1973). But in the years following enactment of FWPCA, EPA consistently took the official position that the statutory compliance date was absolute and that it was not waived by the absence of BPT guidelines.[14] The first draft permit for the Canton mill issued by OEPA in June 1974 required compliance by September 1976. EPA's position as to the Act's time requirement was not challenged by a court of appeals until our decision in *Republic Steel I* on June 23, 1977 – only days before the July 1, 1977, dead-

[14] *See, e.g.,* United States Environmental Protection Agency, Decision of the General Counsel #4, in 1 DECISIONS OF THE ADMINISTRATOR AND DECISIONS OF THE GENERAL COUNSEL [hereinafter "DGC"] 177, 181 (4-4-75), *aff'd,* Decision of the Administrator #75-5, 1 DGC 136, 144 (12-5-75); Decision of the General Counsel #11, 1 DGC 209, 210-11 (5-7-75); Decision of the General Counsel #23, 1 DGC 305, 314 (7-3-75); Decision of the General Counsel #26, 1 DGC 327, 328, 330-31 (7-24-75), *aff'd,* Decision of the Administrator #75-9, 1 DGC 106, 108-09 (9-30-75); Decision of the General Counsel #45, 2 DGC, 230, 232-36, *aff'd,* Decision of the Administrator #75-10, 2 DGC 27 (8-10-76).

See also United States Steel Corp. v. *Train,* 556 F.2d 822, 853-55 (7th Cir. 1977); *Bethlehem Steel Corp.* v. *Train,* 544 F. 2d 657, 660 (3d Cir. 1976); 40 C.F.R. § 125.11(c) (promulgated 5-22-73).

line.[15] Republic can hardly claim that its noncompliance was induced by that decision, since by even the most conservative estimates the necessary equipment would take many months to construct.[16] Nor can the company maintain that it ever had a vested right in the result ordered in *Republic Steel I,* since our mandate there never took effect, and since the Supreme Court later vacated the judgment altogether. *Cf. Bradley, supra,* 416 U.S. at 720.

In any event, Republic does not seriously claim that its noncompliance with the July 1, 1977, deadline is the result of an honest belief that the deadline was invalid. Rather the company maintains that it was unable to meet the deadline, despite good faith efforts, because of the absence of BPT guidelines from EPA. If this is true, then the new § 309(a)(5)(B) procedure can provide any justified relief.[17]

The petition for review is dismissed.

[15] Similar considerations would preclude any possible applicability of the ex post facto clause to this case. The existence of the July 1, 1977, deadline, as construed by EPA was an "operative fact" sufficient to provide fair warning to Republic. *Dobbert* v. *Florida,* 432 U.S. 282, 297-98 (1977).

[16] The same rationale precludes any claim that noncompliance with the deadline was induced by OEPA's agreement to a 42 month compliance schedule in the fall of 1975. Republic concedes that its duty to commence compliance measures attached prior to that agreement. *See Republic Steel I,* 557 F.2d at 94.

[17] We do not mean to suggest that Republic may in any sense be *entitled* to an extension as a matter of law. The decision on whether or not to grant an extension is committed to the Administrator's discretion, based on his assessment of the factors listed in § 309(a)(5)(B). Sen. Rep. 95-370, 95th Cong., 1st Sess., reprinted in 1977 U. S. Code Cong. & Admin. News 4326, 4386-87. *See Quarles, Impact of the 1977 Clean Water Act Amendments on Industrial Dischargers,* ENV. REP. MONOGRAPH No. 25 at 2 (1978). *See generally Vermont Yankee Nuclear Power Corp.* v. *NRDC,* — U.S. —, 46 U.S.L.W. 4301 (1978).

APPENDIX B

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

[Filed August 21, 1978]

REPUBLIC STEEL CORPORATION,
Petitioner,
v.

DOUGLAS M. COSTLE, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency,
Respondents.

} ORDER

Before: CELEBREZZE, LIVELY and KEITH, Circuit Judges.

Pursuant to the mandate of the Supreme Court of the United States, and upon consideration of the further briefs and oral argument of counsel,

It is ordered that the petition to review an order of the Environmental Protection Agency be and it is hereby dismissed.

Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

/s/ BY: GRACE KELLY
Chief Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

EBEN H. COCKLEY, ESQ.
Jones, Day, Reavis & Pogue
1700 Union Commerce Bldg.
Cleveland, Ohio 44115

RE: Douglas M. Costle, Administrator,
Environmental Protection Agency, et al.
v. Republic Steel Corporation, et al.
No. 77-631

Dear Mr. Cockley:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Public Law 95-217.

Very truly yours,
MICHAEL RODAK, JR., Clerk

/s/ Lawrence P. Gill
Deputy

APPENDIX D

No. 76-1557

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

RUSSELL E. TRAIN, Administrator, U. S. Environmental Protection Agency,

GEORGE R. ALEXANDER, JR., Regional Administrator, U. S. Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, *Respondents.*

PETITION to review action of the Administrator of the United States Environmental Protection Agency

Decided and Filed June 23, 1977.

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN,* District Judge.

CELEBREZZE, Circuit Judge. This case of first impression arises under the 1972 amendments to the Federal Water Pollution Control Act, P.L. 92-500.[1] The question presented is whether failure of the Administrator of the United States Environmental Protection Agency (EPA)

* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

[1] 33 U.S.C. § 1251 *et seq.* (Supp. III 1973).

to define interim effluent limitations reflecting a given level of pollution control technology, as required by the Act, frees an authorized state agency to issue a discharge permit which sanctions noncompliance with the statutory deadline for achieving that degree of effluent abatement.

The law in the case consists of three interdependent provisions of the Act which are at the crux of the regulatory scheme to control point sources of water pollution. Section 301(b)[2] defines an inflexible schedule for achieving two interim levels of effluent abatement in furtherance of "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1). Key to this litigation is the subsection 301(b)(1)(A)(i) requirement of conformity by July 1, 1977 with "effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available [BPT] as defined by the Administrator pursuant to section [304(b)] of [the Act] * * *." Section 304(b)(1),[3] in turn, obligates the Administrator to publish by October 18, 1973, regulations establishing effluent guidelines reflecting BPT for categories of dischargers including iron and steel manufacturing. See section 306(b)(1)(A).[4]

Pollution control standards promulgated pursuant to sections 301 and 304 are implemented nationally through a decentralized permit granting mechanism defined in section 402[5] as the National Pollutant Discharge Elimination System (NPDES). Subsection 402(a)(1) empowers EPA in the normal course to issue permits which impose in-

[2] 33 U.S.C. § 1311(b).

[3] 33 U.S.C. § 1314(b)(1).

[4] 33 U.S.C. § 1316(b)(1)(A) lists the minimum industry categories of pollution sources for which regulations must be promulgated.

[5] 33 U.S.C. § 1342.

dustry-wide effluent limitations which it has already defined. In addition, EPA may define these limitations on a case by case basis "prior to the taking of necessary implementing actions relating to all such requirements" (i.e., while rule making is still in progress). *Id.*

Subsection 402(b) directs the Administrator to delegate permit granting authority to states which have proposed self-regulatory programs which are operationally compatible with uniform administration of the Act. To ensure that qualifying state environmental agencies apply effluent limitations even-handedly, subsection 402(d)(2)(B) empowers the Administrator to block issuance of any proposed NPDES permit which he deems to be "outside the guidelines and requirements of [the Act]." *Id.* Whether federal or state in origin, all NPDES permits must ensure compliance with "applicable requirements" of six enumerated provisions of the Act including section 301. In addition, all permits must issue on or before December 31, 1974, pursuant to subsection 402(k).[6]

In July, 1972, Republic Steel Corporation (Republic) applied for a federal permit to continue discharging effluents from its Canton, Ohio steel mill into Nimishillen Creek. The Canton mill is an integrated steel manufacturing operation engaged primarily in the processing of alloy and stainless steel. In March, 1974, Ohio received approval from EPA under section 402(b) to begin issuing NPDES permits, and Republic immediately commenced to negotiate with the Ohio Environmental Protection Agency (Ohio EPA).

[6] This deadline is not expressly mandated by the Act, but may be inferred from the fact that 33 U.S.C. § 1342(k) states that continuation of effluent discharge without a permit after December 31, 1974 will violate the Act unless a permit application is pending and disposition has been delayed for reasons other than the discharger's own negligence. *See Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 707 (D.C. Cir. 1975).

In June, 1974, Ohio EPA issued a draft permit[7] for the Canton mill which incorporated *state defined* effluent limitations under state estimates of BPT. The permit provided for a 24 month compliance schedule compatible with the Act's July 1, 1977 interim implementation deadline. At that time EPA had failed to promulgate any section 304(b) effluent limitation guidelines for iron and steel manufacturing.[8] As of the present date no final regulations exist covering alloy and stainless steel operation.[9]

Understandably, in the absence of controlling federal regulations, Republic sought to exploit available state administrative procedures to secure the most favorable permit terms and conditions. Prolonged hearings and negotiations with Ohio EPA resulted in redefinition of the originally proposed effluent limitations. On August 1, 1975, eight months after the last date envisioned by Congress for routine issuance of NPDES permits, final agreement was reached and the implementation period commenced to run. However, Republic continued to assert that full compliance within 24 months was physically impossible.[10] This prompted further adjudication hearings at which Republic presented unchallenged engineering and procure-

[7] NPDES permit No. D 300*AD.

[8] Regulations defining BPT effluent limitations for primary operations in carbon steel manufacturing were promulgated in 39 *Fed. Reg.* 24114 (June 28, 1974). However, these regulations were subsequently remanded in their entirety to the Administrator for revision in accordance with the decision in *American Iron and Steel Institute* v. *EPA*, 526 F. 2d 1027 (3rd Cir. 1975). As of the date of oral argument in the instant case, no revised regulations had been promulgated.

[9] "Interim final" guidelines covering alloy and stainless steel operations were published in 41 *Fed. Reg.* 12990 (March 29, 1976).

[10] Had Republic's permit been issued before the statutory deadline mandated by 33 U.S.C. § 1342(k), the company would have had 30 months to achieve BPT effluent levels.

ment data which convinced Ohio EPA to modify the permit to allow 42 months for development and installation of antipollution devices. Ohio EPA was aware that this change extended compliance beyond the July 1, 1977, date imposed by section 301(b)(1)(A)(i). However, the state administrator believed that the special circumstances of the case legally justified this deviation.

In January, 1976, Ohio EPA transmitted the final NPDES permit to EPA's Region V office as required by section 402(d)(1). Within 90 days the Director of the Enforcement Division of Region V objected to its issuance, exercising his authority under section 402(d)(2)(B). He did not expressly question the reasonableness of the state's BPT effluent standards or the 42 month implementation schedule. Rather, he concluded that the permit violated section 301 because full compliance would not be achieved until after July 1, 1977. Republic filed a timely petition for judicial review, pursuant to section 509(b)(1)(F),[11] challenging this determination.

We do not question EPA's good faith in attempting to discharge the ambitious and often ambiguous duties imposed upon it by a "poorly drafted and astonishingly imprecise statute." *E.I. du Pont de Nemours & Company* v. *Train*, 541 F.2d 1018, 1026 (4th Cir. 1976). Many factors, some admittedly beyond EPA's control, have conspired to frustrate its legitimate compliance efforts. In particular, virtually every exercise of the agency's discretion has precipitated protracted litigation challenging the legitimacy of its authority or the substance of its "final" regulations. *See American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023, 1027 (10th Cir. 1976) (thirteen relevant cases cited).

The fact remains, however, that the imperative nature of EPA's rule making responsibilities under the Act has

[11] 33 U.S.C. § 1369(b)(1)(F).

been confirmed through litigation. In 1975, the United States Court of Appeals for the District of Columbia affirmed the authority of a federal district court to compel the agency to adhere to a remedial court imposed timetable for the publication of guidelines for all point source effluent discharges. *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975). Unfortunately, judicial intervention did not avert the regrettable situation which confronts us here. The inability of EPA to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of an abbreviated compliance schedule, or society must tolerate slippage of an interim pollution abatement deadline.

Republic contends that the language of section 301(b)(1)(A)(i) expressly conditions adherence to the July 1, 1977, deadline upon definition *by the Administrator* of BPT effluent limitations and guidelines *pursuant to section 304(b) of the Act*. Therefore, the Administrator's failure to satisfy this condition precedent by publishing final regulations for alloy and stainless steel manufacturing excuses Republic's noncompliance with the July 1 date. We reluctantly agree. The import of the section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them. *See United States* v. *GAF Corporation*, 389 F. Supp. 1379, 1386 (S.D. Tex. 1975). The presence within the Act of successive deadlines for promulgation of standards, issuance of permits, and conformance with effluent limitations bespeaks a rational implementation strategy anticipating a discrete sequence of events:

> The Act's text and its legislative history make clear that as a general matter the section 304(b)(1) guide-

> lines and the section 301(b)(1) limitations were to be developed prior to the issuance of permits. Sections 402(a) and 402(b) require that permits issued by the Administrator and by the states assure compliance with the effluent limitations of section 301. The Senate Report confirms the interdependence of the three provisions. That report states that "[s]ubsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." Another portion of the Senate Report indicates that at least 30 months lead time is required to afford industries an opportunity to complete construction and modifications necessary to comply with the phase one effluent limitation deadline. Under the final version of the Act effluent limitations and permits would be required by December 31, 1974, in order to provide polluters 30 months to comply with the July 1, 1977, deadline.

Natural Resources Defense Council, Inc. v. *Train*, 510 F.2d 692, 707-708 (D.C. Cir. 1975) (footnotes omitted).

The crucial role of federal rule making in achieving meaningful pollution control on a national scale is revealed by the Third Circuit's analysis in *American Iron and Steel Institute* v. *EPA*:

> [W]e reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is *more stringent than the ceiling*.

526 F. 2d, 1027, 1045 (3rd Cir. 1975). (emphasis added). If no federal standards exist, *any* state limitation on discharge, no matter how insignificant, become more stringent than nonexistent ceilings imposed by the Act. *See* section 301(b)(1)(C). Surely Congress did not intend for the Act to be construed to foster token, *ad hoc*, clean up efforts which would inevitably defeat achievement of the goal of zero pollution by 1985.[12]

EPA answers Republic's argument by exhorting us to accept the "plain meaning" of section 301(b)(1)(A). The agency contends that the language of the section admits to no other interpretation than that July 1, 1977 is to be a "uniform deadline on all industrial dischargers, * * * plain, unequivocal and mandatory." Unfortunately, EPA's argument is persuasive only if we accept an expurgated version of the section which omits reference to the duty owed by the Administrator to publish regulations by a fixed date.

EPA correctly points out that the Act is devoid of language countenancing exceptions to the July 1, 1977, deadline under any condition. The Act's legislative history is replete with statements attesting to the inflexible nature of the administrative timetable.[13] In addition, Congress rejected a provision in the House version of the measure which would have allowed dischargers a discretionary extension of time in the face of impending noncompliance

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[12] The Director of Ohio EPA, a respondent in the case whose position is aligned with that of Republic, argues that he issued Republic's NPDES permit under the authority of 33 U.S.C. § 1311 (b) (1) (C) which allows states to impose more stringent limitations than those applicable under the Act. If we follow this strained rationale, we would have to approve any state permit which authorized dischargers to maintain current effluent levels because *any* standard is more stringent than a nonexistent federal ceiling. This we refuse to do because it would be inimical to achieving meaningful pollution abatement on a national scale.

[13] For a comprehensive review of this legislative history, see *Bethlehem Steel Corporation* v. *Train*, 544 F. 2d 657, 661-662 (3rd Cir. 1976).

due to physical or legal impossibility.[14] Nevertheless, nothing cited to us by EPA suggests that Congress anticipated the "Catch 22" situation inherent in the facts of this case. The language of the Act and its legislative history make clear that Congress expected EPA to define the rules before subjecting dischargers to potential civil and criminal penalties. *Natural Resources Defense Council, Inc.* v. *Train, supra.*

EPA attempts to bolster its position by emphasizing its authority under section 402(a)(1), in advance of formally promulgated regulations, to issue and enforce NPDES permits imposing "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." *Id.* From this, it would have us conclude that the duty of the discharger to achieve BPT by July 1, 1977 must be independent of EPA's obligation to promulgate the necessary guidelines by October 18, 1973. EPA cites *Bethlehem Steel Corporation* v. *Train,* 544 F. 2d 657 (3rd Cir. 1976), and *United States* v. *Cutter Laboratories, Inc.,* 413 F. Supp. 1295 (E.D. Tenn. 1976), in support of this position.[15]

A careful reading of both opinions confirms that EPA's reliance upon them is misplaced. The Third Circuit correctly categorizes EPA's authority under section 402

[14] See proposed section 301(b)(3). *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93rd Cong. 965 (Jan. 1973).

[15] EPA also draws our attention to *State Water Control Board* v. *Train,* 8 E.R.C. 1609 (E.D. Va., 1976) which upheld the inflexibility of a different section 301 deadline where noncompliance was due to the failure of Congress to appropriate sufficient money for public works (in this case, the construction of municipal sewage treatment plants). This case is readily distinguished from the present situation where noncompliance is linked to derelection by EPA of duties imposed by the Act itself as a condition precedent to compliance.

(a)(1) to issue NPDES permits on a case by case basis as a *temporary* expedient to ensure immediate progress during the year of rule making contemplated by section 402(b):

> As a result [of the nonexistence of section 304 and 301 guidelines and limitations for iron and steel manufacturing as of the date of the opinion], permits have been issued to iron and steel manufacturers under a clause of section 402(a)(1) that empowers the EPA to grant permits, *on an interim basis,* before formal guidelines are promulgated.

Bethlehem Steel Corporation v. *Train,* 544 F. 2d at 659 (emphasis added). In the *Bethlehem Steel* case EPA granted the permit on December 31, 1974, the last day mandated by Congress for routine issuance of NPDES permits. Therefore, Bethlehem Steel enjoyed a 30 month compliance schedule, the minimum period possible under the statutory scheme assuming no administrative slippage. In contrast, Republic's permit was issued by a state agency eight months after the expiration of the permit granting deadline, affording Republic only 24 months for compliance. This factual difference was not overlooked by the Third Circuit which carefully excludes Republic's situation from the purview of its holding in the *Bethlehem Steel* case.[16]

We read the *Bethlehem Steel* and *Cutter Laboratory* decisions as standing for the limited proposition that a July 1, 1977, deadline, written into an NPDES permit *issued by EPA on or before December 31, 1974,* is enforceable despite the absence of BPT federal guidelines. Although we may

[16] *See* 544 F. 2d at 660 n. 20. Republic appeared as *amicus curiae* in that case on behalf of Bethlehem Steel. *United States Steel Corporation* v. *Train,* Nos. 76-1425 and 76-1616 (7th Cir. May 13, 1977), a case in which EPA issued the NPDES permit in October, 1974, while Federal BPT standards existed for iron and carbon steel manufacturing, is distinguishable from our decision here on the same ground.

share his view, we find no pursuasive authority for extending its application to permits issued by EPA after 1974.[17] In addition, we are convinced that the Act expressly forecloses this result when the permit issuing authority is a state agency. Section 302(1)(A) empowers states to issue NPDES permits which supply, and insure compliance with, any applicable requirements of sections 301, * * * of [the Act]." *Id.* Our holding that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations is tantamount to a finding that the July 1, 1977, deadline is no longer an "applicable requirement" of the Act. Therefore, in this case, Ohio EPA was not bound to apply it and EPA was without authority to object to the proposed permit on this ground.[18]

EPA's final contention is that it complied with the rule making requirements of section 304(b) by implicitly ratifying the effluent limitations defined by Ohio EPA. EPA ignores the actual language of section 301(b)(1)(A)(i) which demands that BPT guidelines be promulgated pursuant to the procedure set forth in section 304(b). Ohio EPA did not follow that procedure for the obvious reason that section 304(b) is exclusively addressed to the Administrator of EPA. We reject the notion that state acts can be federalized *sub silentio* by the mere acquiescence of an administrative agency in the absence of clear statutory provisions to that effect.

[17] The difficulty is dramatized by a hypothetical case in which EPA issues an NPDES permit in 1977 requiring compliance with the July 1977 completion date. Under such circumstances compliance may well be foreclosed by constitutional objections. *See United States Steel Corporation* v. *Train*, Nos. 76-1425 and 76-1616, at 51 (7th Cir. May 13, 1977).

[18] We expressly exclude from our holding situations in which state agencies may have issued NPDES permits in the absence of federal guidelines prior to December 31, 1974.

Republic urges us to remand the case to EPA with directions that the agency unconditionally approve immediate issuance of Republic's NPDES permit in its original form. However, the record suggests a more appropriate remedy. If we assume that the Administrator satsifactorily performed all the tasks incumbent upon him under section 301 and 304, Republic could not have received its permit any earlier than September 1, 1974.[19] This would have afforded no more than 34 months to achieve final BPT effluent limitations. The actual permit provides 42 months, eight more than Republic would have been entitled to had there been no distortion of the Act's timetable. Our disposition of this case is intended to relieve the discharger of the unfair consequences flowing from EPA's administrative shortcomings. It is not intended to bestow special benefits not enjoyed by other permittees.

EPA is not foreclosed from objecting to Republic's permit on grounds other than the termination date of its compliance schedule. Under the special circumstances of this case, we believe that EPA must be granted a second opportunity to scrutinize the balance of the permit for consistency with the Act.[20] Perhaps the inherent reasonableness of the proposed 42 month period is amenable to administrative review under existing regulations or sections other than 301. That is for EPA to determine in the first instance.

To guard against the possibility that situations such as this will prompt state agencies to propose extravagant compliance schedules, we remand the case to EPA with direc-

[19] This date approximately reflects the date upon which Republic's permit was first issued by Ohio EPA (prior to extensive renegotiations and modification of terms) plus the maximum period reserved for the filing of objections by EPA.

[20] The obviousness of the permit's putative section 301 violation may have prompted EPA to bypass an exhaustive review of its other substantive provisions.

tions that the agency acquiesce to issuance by Ohio EPA of Republic's NPDES permit unless, within 30 days, it specifies pursuasive new grounds for objection under section 402(d)(2)(B).

Remanded.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 76-1557

[Filed June 23, 1977]

REPUBLIC STEEL CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency,

GEORGE R. ALEXANDER, JR. Regional Administrator, United States Environmental Protection Agency,

and

NED E. WILLIAMS, Director, Ohio Environmental Protection Agency, RESPONDENTS

Before: CELEBREZZE and LIVELY, Circuit Judges, and RUBIN, District Judge.

On petition to review an action of the Administrator of the United States Environmental Protection Agency,

This cause came on to be heard on the brief and record of proceedings before the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the case be and it is hereby remanded to the Environmental Protection Agency with directions.

Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Region V

230 South Dearborn St.
Chicago, Illinois 60604
Mar. 30, 1976

Mr. Ned Williams, Director
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216

RE: Republic Steel Corporation
Canton, Ohio Facility
OEPA Permit No. D 300°AD

Dear Mr. Williams:

On January 5, 1976, the Ohio Environmental Protection Agency (OEPA) submitted for United States Environmental Protection Agency (USEPA) consideration pursuant to § 402(d) of the Federal Water Pollution Control Act, as amended, (FWPCA) and the OEPA-USEPA Memorandum of Agreement, a stipulation and proposed permit for the referenced facility. The transmittal letter noted that the schedule of compliance for BPT effluent limitations in this permit extended beyond July 1, 1977. A 45-day period was specified for this Agency's response. Subsequently, the response time was extended to April 1, 1976, by mutual agreement of our respective agencies.

Because of the legal and policy implications involved in extending the statutory requirement for achievement of BPT by July 1, 1977, (Section 301 of the FWPCA), Region V asked USEPA Headquarters for review and

comment. The recommendation of the Deputy Assistant Administrator for Water Enforcement is attached to this letter.

We have also engaged in numerous extended discussions of this permit and the problems it poses, most recently a conference call on March 29, 1976, among Region V staff, a representative of the Ohio Attorney-General, and counsel and others for Republic Steel Corporation.

Based on the record presented, the transcript of proceedings, the proposed NPDES permit, and the Stipulation of the parties, Region V, USEPA, hereby makes the following findings:

1. Permit No. D 300°AD was issued to Republic Steel Corporation for its Canton, Ohio facility on June 10, 1974. Final effluent guidelines for the Iron & Steel Industry had not been promulgated as of the date of permit issuance.

2. The final effluent limitations specified in the proposed permit represent BPT as stipulated by the OEPA and Republic in the absence of promulgated guidelines. By letter of February 24, 1976 from A. H. Manzardo to Ned Williams, Region V concurred in the appropriateness of the final limitations.

3. An adjudicatory hearing was held to consider the Schedule of Compliance for achieving the final limitations specified in the permit.

4. As a result of said hearing, it was stipulated by the parties (OEPA) and Republic Steel) that the Schedule of Compliance specified in the proposed permit is reasonable for achieving the final limitations in the permit.

5. The reasonableness of the Schedule of Compliance is not questioned by USEPA.

6. The FWPCA mandates compliance with BPT no later than July 1, 1977.
7. The Schedule of Compliance runs for 41 months and would result in achievement of BPT subsequent to July 1, 1977.
8. The Administrator of the USEPA, in NPDES Appeal No. 75-9, Bethlehem Steel Corporation, dated September 30, 1975, and the USEPA General Counsel in Decision No. 26, Bethlehem Steel Corporation, dated July 24, 1975 have held that compliance with BPT limitations must be achieved no later than July 1, 1977.

Based upon the foregoing findings, Region V, USEPA, has determined that the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the Schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit. If the proposed permit can be revised to conform with the requirements of the FWPCA, this objection will be withdrawn.

Very truly yours,

/s/ James O. McDonald
JAMES O. McDONALD
Director
Enforcement Division

Attachment

cc: Mr. John Daniel
Office of the Attorney General
State of Ohio

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Feb. 25, 1976

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Director, Enforcement Division, Region V

FROM: Deputy Assistant Administrator for Water Enforcement

SUBJECT: Republic Steel Corporation, Canton, Ohio
Stipulation and Proposed NPDES Permit

This is in response to your letter of January 22, 1976, regarding the Ohio EPA proceedings on the above-identified permit.

We have reviewed the Ohio EPA letter to your office dated January 5, 1976, the "Stipulation" between the State of Ohio and Republic Steel bearing a filing date of January 2, 1976, the proposed OEPA permit, No. D 300 °AD, bearing a filing date of January 2, 1976, and the transcript of proceedings in the Ohio adjudicatory hearing.

In our opinion, U.S. EPA must object to the schedule of compliance in the proposed Ohio permit on the ground that it is outside the requirements of section 301 of the Federal Water Pollution Control Act.

/s/ Jeffrey G. Miller
JEFFREY G. MILLER

APPENDIX G

United States Constitution

ARTICLE I, SECTION 9, CLAUSE 3

No Bill of Attainder or ex post facto law shall be passed

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 et seq., as amended by the 1977 Amendments, Public Law 95-217, 91 Stat. 1566. Provisions omitted by the 1977 Amendments are enclosed in brackets, provisions adding new material are printed in italics, unchanged provisions are printed in roman.

Section 301(a) - (b)

Sec. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved –

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations. (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2)(A) [not later than July 1, 1983] *for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph,* effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations

issued by the Administrator pursuant to section 304 (b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; [and]

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act [.];

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitation in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304 (a)(4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

Section 304(b)

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall –

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering

aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories of classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administration deems appropriate; [and]

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of pòint sources, taking into account the cost of achieving such elimination of the discharge of pollutants[.]; *and*

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point

sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 301(b)(2)(E) of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 306(b)(1)(A)

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;

textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

Section 309(a) - (d)

SEC. 309. (a)(1) whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act in a permit issued by a State under an approved permit program under section 402 *or 404 of this Act, he* shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of

this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), *except where an extension has been granted under paragraph (5)(B) of this subsection,* the Administrator shall enforce any permit condition or limitation with respect to any person —

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, [or] 308, *318, or 405* of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State *or in a permit issued under section 404 of this Act by a State,* he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. [Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to ex-

ceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.] In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compli-

ance with such requirements are under construction, grant an extension of the date referred to in section 301(b)(1)(A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b)(1) (A) or (C) of this Act, (B) that such person cannot meet the requirements for a time extension under section 301(i)(2) of this Act, and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c)(1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such actions in a permit issued under section 402 of this Act by the Administrator or by a State, *or in a permit issued under section 404 of this Act by a State,* shall be punished by a fine of not less than $2,500 nor more than $25,000 per day

of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

(d) Any person who violates section 301, 302, 306, 307, [or] 308, *318 or 405* of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, *or in a permit issued under section 404 of this Act by a State,* and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Section 402(a) - (f), (k)

Sec. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge

will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable

waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require *the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to* adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304[(h)](*i*)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the is-

suance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. *Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.*

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) *In any case where, after the date of enactment of this paragraph, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act.*

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection

(d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

* * * *

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

Section 505

Sec. 505. (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section

respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard or performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this

Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.